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VERMONT

COMMITTEES:
... NUTRITION, AND
...ESTRY
APPROPRIATIONS
JUDICIARY

United States Senate

WASHINGTON, DC 20510–4502

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

EX PARTE OR LATE FILED

Reply comments regarding procedures for Reviewing Requests for Relief from certain State and Local Regulations; WT Docket No. 97-192 ~~97-197~~

Comments on Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities; MM Docket No. 97-182

THE COMMENTS OF SENATOR PATRICK LEAHY

I. INTRODUCTION

I am one of five Senators who voted against the Telecommunications Act of 1996. One of my fears was that states and local communities would lose control over the location and construction of communications towers. I wish I had been wrong.

Under that Act, the will and voices of Vermont towns are muted, and when big, unsightly towers are proposed, towns no longer can say no. It is unfortunate that the Telecommunications Act received 91 votes. That Act also prohibits towns and cities from having stricter health and safety standards regarding the environmental effects of radio frequency emissions.

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The Act provides that no state or local government can prohibit the provision of personal wireless services nor can they regulate wireless facilities regarding health effects "to the extent that such facilities comply with the Federal Communications Commission's regulations . . . ."

The State of Vermont -- from Governor Howard Dean to the Vermont Environmental Board, local zoning officials, mayors and citizens -- are all concerned that they are losing control over the siting, design and construction of telecommunications towers and related facilities.

I do not want Vermont turned into a giant pincushion with 200-foot towers indiscriminately sprouting on every mountain and in every valley. Vermonters should be able to determine where these towers are located and have the ability to insist on co-location of towers and other reasonable requirements.

Vermont enacted its landmark legislation, called Act 250 (Title 10, Chap. 151, of Vermont's Land Use and Development Law), to carefully establish procedures to balance the interests of development with the interests of the environment, health and safety, resource conservation and the protection of Vermont's natural beauty.

The proposals under consideration will interfere with the operation of Act 250 and take away local community and state control over development. Make no mistake -- I am for progress, but I am not for ill-considered progress at the expense of Vermont families and homeowners.

2. PREEMPTION FOR DIGITAL TELEVISION TOWERS (MM Doc. 97-182)

The National Association of Broadcasters (NAB) and the Association for Maximum Service Television (petitioners) point out that conversion to the new digital TV will require 1,000 new or upgraded towers nationwide. Also, because of increased weight and needed structure changes, a number of FM broadcast stations which have co-located their FM antennas on TV towers will be forced to relocate to other towers or locations.

Petitioners request in this proposal that state or local governments have no control over the location of towers if based on the environmental or health effects of radio frequency emissions if the emissions do not exceed FCC rules. Petitioners also propose that "any state or local government decision denying a request [to locate a tower] be in writing, supported by substantial evidence, and delivered to all applicants within 5 days."

Your docket raised a number of questions. "Should federal regulation preempt local regulation intended for aesthetic purposes?"

The answer is: absolutely not. The backbone of Vermont's beauty is its Green Mountains surrounded by magnificent views and valleys, rivers and streams. Vermonters do not want scenic vistas destroyed by giant towers bristling with all manner of antennas and bright lights.

When I step out my front door in Middlesex, I never cease to enjoy the magnificent view. I am sure all Vermonters feel the same way I do about the scenic wonders of our state. We want to move with care to avoid the indiscriminate placement of towers that would jeopardize one of our state's most precious assets.

I recognize that it is important that Vermont not be left out of technological advances but that is the whole point of having an Act 250 process. Vermont communities and the state of Vermont must have a role in deciding where these towers are going to go and must be able to take into account the protection of Vermont's scenic beauty. Indeed, by requiring the companies to work with Vermont towns, acceptable alternative locations could be suggested. This would be much better than allowing any company to just come in willy-nilly and plop down towers next to our backyards.

Your federal regulations should be carefully designed to permit Vermont, and states with laws like Act 250, to control where these towers are located. Regional planning is also important since knowing the proposed locations of other towers will help improve the decision-making process.

The FCC also asks "should the Commission preempt state and local restrictions regarding exposure to radio frequency emissions from broadcast transmission facilities?" The answer is no. States have a primary responsibility in protecting the health and safety of their citizens. While states should be reasonable in the exercise of that, power it should, nonetheless, remain their power.

I am certain some out-of-state drivers would prefer it if local Vermont villages could not impose speed limits on traffic -- but those limits protect Vermont families. Indeed portions of the FCC's August 25, 1997, second memorandum opinion and order discuss the concerns of exposure to excessive radio frequency electromagnetic fields. Reasonable and more-protective state regulation, based on science, should be permitted under the final FCC rules.

III. REPLY COMMENTS TO AUGUST 25, 1997, DOCKET (WT 97-197)

Note that most of my comments are also applicable to FCC dockets published on August 25 (WT 97-192, ET 93-62 and RM-8577) and the petition of the Cellular Telecommunications Industry Association (RM-8577) regarding preemption of local and state regulation of commercial mobile radio service transmitting facilities.

First, I want to make clear that I endorse the comments filed by the State of Vermont Environmental Board, supported in a letter to the Commission by Governor Dean, and the Vermont Planners Association. They have done an excellent job representing the views of Vermonters and they make a strong case for giving state and local governments more control over these important land use issues.

The Vermont Environment Board carefully lays out the history of Act 250 and explains how well this law has worked in both promoting business opportunities in Vermont and in protecting the environment and Vermont's natural beauty.

I agree with them that the FCC should not proceed with any further preemption of Vermont's Act 250 regarding wireless service facilities. They point out that for the period January 1990 through 1995, there were a total of 66 permit applications for new or modified structures and that 58 applicants received permits and that only two applicants were denied.

Vermont's Act 250 is designed to stand in the way of development proposals only when the project is not in the best interests of Vermont's future.

Act 250's burden of proof to show compliance is very properly on the applicant. Also, the FCC should not attempt to control what evidence is admissible -- Act 250 carefully balances the needs of the developer and local communities.

Shifting the burden of proof to the community instead of imposing it on the company that wants to build the tower is wrongheaded. The developer has the data and resources to explain and justify its choice -- it should not be up to the state or local community to prove the negative. The Vermont Environmental Board also explains in its comments how this assumption that the developer is correct wrongly shifts the burden of proof to the party with the least evidence.

The Act 250 process which places the burden of going forward and producing evidence on the applicant has worked very well in Vermont in most instances and should not be overturned by this Federal rule making.

For example, protection of Vermont's scenic beauty may require limiting construction on mountain peaks or on mountain slopes. Act 250 requires that an Act 250 permit be obtained for construction at an elevation of above 2,500 feet. Thus the applicant has the burden of demonstrating the need for the tower. This process has not inhibited growth and development in Vermont, and it instead has helped preserve Vermont for future generations.

As noted by the Vermont Environmental Board, the proposal:

> would interfere with legitimate fact finding by limiting the scope of what evidence may be introduced into the record. Such preemption is not warranted here in Vermont given Act 250's long standing regulation of issues related to communication and broadcast facilities, its sophisticated understanding of these issues, and the successful deployment of personal wireless services in Vermont.

For example, it may be especially important in some circumstances to consider the cumulative effects of successive multiple users on a tower located near recreational areas or schools. Vermont should be able to consider all sources of overlapping emissions.

IV. SUMMARY

The FCC should not further preempt state and local laws related to personal wireless service facilities and digital television towers. Vermont citizens and communities should be able to participate in the important decisions affecting their families and their future. The location of large transmission towers can have significant effects on property values, health, enjoyment of one's home and the ability to sell one's home. The Telecommunications Act went too far toward preemption of local control and the proposed FCC implementation goes even farther.

Respectfully submitted

PATRICK LEAHY
U.S. Senator

October 22, 1997